[ORIGINAL CIVIL JURISDICTION]

MURISON, C.J.

February 3, 1932.

CHOP CHEONG TUCK.....Plaintiffs.

vs.

1. CHOP TACK LOONG,
2. LUM TING CHOY otherwise known as LUM KEE,
3. LEE HON CHEONG.....Defendants.

[SINGAPORE SUIT No. 1175 of 1931]

Practice—Action against firm—Individual partners joined with firm as defendants—Joinder disallowed — Partnership — Powers of active partner—Implied authority to pledge firm's credit —Liability of firm—Partnership Act, 1890, S.5.

A plaintiff, suing a partnership in its firm name, is not entitled to join the individual partners thereof as additional defendants where the object of the proceedings against them is to make them liable as members of the firm. The provisions of section 212 Civil Procedure Code which enable a plaintiff to enter judgment against a defendant who has no good defence to the action and to proceed against any other or others who has or have a defence do not apply to the case of partners.

The managing partner of a trading partnership has implied authority to borrow money for partnership purposes and in so doing may bind the other partners notwithstanding that he may have wrongfully applied it to other than partnership purposes.

Brown v. *Kidger*, (1858) 28 L.J. Ex. 66 applied.

Where the borrowing partner represents to the lender that it is necessary for him to borrow for the purposes of the firm, and the lender has no knowledge to the contrary, and there is no suggestion of fraud, the lender can recover.

Okell v. *Eaton*, (1874) 31 L.T. 334 applied.

Action tried before Murison, C.J.

The plaintiffs claimed from the defendants the sum of $6,000 for money lent to the defendants at their request. The 2nd defendant denied liability and alleged that the loan was obtained by the 3rd defendant (who was the managing and only active partner of the firm) without the authority of himself and/or another who were dormant partners. He further alleged that the partnership articles prohibited any partner from borrowing money on the credit of the firm, and that the 3rd defendant had no authority to pledge the firm's credit except for purposes connected with the firm's ordinary course of business.

Burke for the Plaintiffs.

H. R. S. Zehnder for the 1st Defendant.

Mallal for the 2nd Defendant.

Cur. Ad. Vult.

MURISON, C.J.—The Plaintiffs in this case are a firm of merchants carrying on business at Kuala Lumpur and Singapore, as dealers in tinned provisions and cigarettes.

The first Defendants are a firm of Merchants carrying on business in Singapore as rattan merchants. The second and third Defendants are partners in the first Defendant firm.

The action is to recover $6,000 lent by the Plaintiffs to the first Defendant firm in two sums of $3,000 each on the 1st and 15th May, 1931 respectively at the request of the 3rd Defendant.

It appears from the evidence that the managing and only active partner in the Defendant firm was the 3rd Defendant. The others were only dormant partners.

During the hearing at the close of the Plaintiffs' case, Mr. Mallal for the 2nd Defendant, asked to be dismissed from the action upon the ground that no case had been made out against him as severally liable. By section 780(1) of the Civil Procedure Code it is enacted that a firm can be sued in the name of the firm. Mr. Burke, for the Plaintiffs, claimed that this was only one alternative and that he could join the several partners if he wished. He claimed that section 212 provided for this. Section 212 (corresponding to Order XIV Rule 5) is as follows:

> "212. If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the Plaintiff may enter final judgment against the latter, and may issue execution upon such judgment, without prejudice to his right to proceed with his action against the former."

This section appears to me, however, to deal with joint contractors. It does not apply to partners. The proper way to sue a partnership firm is in the firm's name. Partners cannot, from the point of view of their liability as partners as distinguished from individuals, have different liabilities and cannot as partners have separate individual defences. The defence is a defence of the firm by an individual partner. (*Chitty's* King's Bench Forms, page 678). Personal liability as between partners is a different thing. After the liability of the firm is established, execution can follow with or without leave of the Court, as the partners have or have not entered appearance.

In my opinion, therefore, the 2nd Defendant should not have been a party in his own name to the action, and I, therefore, ordered his name to be struck out as a Defendant.

The same remarks apply to the joinder of the 3rd Defendant in his own name. I made no order as to his costs because I think the application should have been made at the beginning of the action.

A judgment in chambers has already been entered against him. I set aside that judgment and order the 3rd Defendant's name to be struck out in this action. I make no order as to his costs.

It appears from the evidence that the manager of the Plaintiff firm in Kuala Lumpur, Leong Cheong Hin a very credible witness—had known 3rd Defendant for ten years before he lent him the $6,000 in question. Witness's firm and the Defendant firm had not ever done business with each other, but the witness knew that Defendant firm had existed for ten years. He met the 3rd Defendant in Singapore in the end of April, 1931. The 3rd Defendant asked for a loan of $6,000 for the Defendant firm. The reason he gave was that the Defendant firm had sold rattans to Hong Kong and Shanghai, but that the Defendant firm did not wish to take payment at Singapore in Hong Kong and Shanghai currency as the exchange was badly against them, and for that reason the Defendant firm were short of money. The witness admits he did not enquire if this were true or not. Eventually the witness lent Defendant the two sums of $3,000 claimed in the action.

There was some suggestion that the $6,000 loan was made to the 3rd Defendant, not for the Defendant firm, but for another firm, the Kuk Wah Tobacco Company of which the 3rd Defendant was at the same time manager and partner. The Plaintiffs' manager, however, distinctly denies this and the manager of the Kuk Wah firm, Lee Sing Cheong produces the Company's ledger (Exhibit 1) which shows no receipt of any sum of $3,000 from the Plaintiff firm. The Plaintiffs' manager, however, was cross-examined upon an entry of $3,000 in his books (Exhibit M and M1) showing a debit of $3,000 against the Kuk Wah Company. That he said was a mistake, and he gave a detailed and quite credible account of how the mistake occurred and how it was corrected. Mr. Zehnder, for the Defendant firm admitted that money, in fact, was credited to the Defendant firm and it is agreed that there is no evidence to show how the $6,000 was used. It disappeared, as the 3rd Defendant himself did.

I come now to the law applicable to the above facts.

The evidence shows that the 3rd Defendant was the only active partner and that the other partners were dormant partners. The law relating to the liability of dormant partners is thus stated by *Lindley* on Partnership, 9th edition, pages 178 and 179:

> "With respect to the liability of dormant partners: a distinction must be drawn between—first, undisclosed principals who carry on a business by partners or agents; and, secondly, persons who simply share the profits of a business carried on by others on their own account, i.e., as principals only, and not as agents for those who share their profits. In the first case the dormant partners are liable for whatever may be done by their partners and agents in the course of transacting the business in the ordinary way; but in the second case the so-called dormant partners are not principals at all, the persons who carry on their business do not carry it on as their agents either really or apparently, and the doctrines applicable to undisclosed principals are altogether excluded."

There is no evidence to show that the Defendant firm were un undisclosed partner and it is not so contended. The Defendant firm were, therefore, not liable indefinitely for whatever the 3rd Defendant chose to do. Their liability, therefore, depended upon the authority, expressed or implied which the 3rd Defendant had to pledge their credit. There was no such express authority because the partnership articles forbade any partner to pledge the firm's credit without the consent of the other partners. (Paragraph 5 of the Partnership Agreement). Further, there is no evidence that the Plaintiff knew of this prohibition, and in these circumstances (but only in these circumstances—section 5 of the Partnership Act 1890–) the question arises whether the 3rd Defendant had any implied authority.

The first point here is whether there can be an implied power to borrow in spite of a prohibition against borrowing in the partnership articles. It is clear that in these circumstances a power can be implied [*Higgins* v. *Beauchamp*, (1914) 3 K.B. at page 1194, Lush, J.]. But in such a case the Plaintiff must show that he was justified in the circumstances in assuming that No. 3 had authority to borrow. That he can prove in two ways; first by showing that the Defendant firm had so conducted itself as to lead him to believe that Defendant No. 3 had such authority, but there is no such suggestion here: and secondly, by showing that the authority was to be implied from the nature of the business carried on *(Higgins* v. *Beauchamp Supra loc cit)*. This latter question is the second point and in regard to that the case of *Brown* v. *Kidger*, (1858) 28 L.J. Ex. 66 is important. That case says that the managing partner of a trading partnership (which the Defendant firm is admitted to be) has implied authority to borrow money for partnership purposes and in so doing may bind the other partners although he may

wrongfully apply it to other than partnership purposes.

The third point is whether the lender must enquire into the necessity for the loan for it is admitted here that the lender did not so enquire. In regard to that the case of *Montaigniac* v. *Shitta*, (1890) 15 A.C. 357 says that where the general agent of a firm (or a partner, *Lindley*, page 191) borrows money the lender need not enquire whether the loan was actually necessary for the purposes of the firm. This must mean that where the borrowing partner represents to the lender that it is necessary for him to borrow for the purposes of the firm, and the lender has no knowledge to the contrary, and there is no suggestion of fraud, the lender can recover. The case of *Okell* v. *Eaton*, (1874) 31 L.T. 334 confirms this statement of the law.

The only evidence on this third point is that of the manager of the Plaintiff firm in Kuala Lumpur in regard to the story of the fall of the exchange in Hongkong and Shanghai to which I have already referred. I believe the witness's evidence that this representation was made by the 3rd Defendant and there is no evidence that the witness had any outside reason to think that the representation itself was untrue, or fraudulent.

These authorities thus establish, in my opinion, that the 3rd Defendant in this case had implied authority from the Defendant firm to borrow the money claimed in this action.

There will be judgment for the Plaintiff against the Defendant firm only, that is the first Defendant, for the amount claimed and costs. I might add that the 2nd Defendant is entitled to be indemnified for his costs as against the first Defendant firm.

Judgment accordingly.

Solicitors for the Plaintiffs—
John G. Campbell & Co.

Solicitors for the 1st Defendants—
Zehnder Bros.

Solicitors for the 2nd Defendant—
N. A. Mallal.

THE END OF THE STRAITS SETTLEMENTS OFFICIAL REPORTS.